make ***any*** credibility determinations or attempt to weigh the evidence. In ruling on a motion for summary judgment or a motion for judgment as a matter of law, it does not matter whether the testimony comes from an interested or a disinterested witness. All that matters is whether there is a legally sufficient evidentiary basis. When the cases STI cites are looked at from this perspective, the cases are easily reconciled and there is no material conflict.[2]

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2. For example, in *Book v. Dettenrieder*, 14 Fed. Appx. 40 (2d Cir. 2001), the plaintiff's testimony was contradicted by "an ample evidentiary basis for the jury's refusal to believe Book's testimony on her pain-and-suffering for a wrist fracture." That evidence included statements by Book to her doctor; the doctor's testimony that it was "impossible to say" whether the fracture would cause pain; and the fact that immediately after the accident Book had resumed training and competition as an elite bicycle racer.

The other cases STI cites on pages 14 through 16 of its Petition fit into the same mold. *E.g.*, *Willis v. State Farm Fire and Cas. Co.*, 219 F.3d 715 (8th Cir. 2000) (evidence that the plaintiff made material misstatements during the fire investigation called into question plaintiff's credibility); *Hiltgen v. Sumrall*, 47 F.3d 695, 700 (5th Cir. 1995) ("interested" driver's testimony that his lights were on was countered by eyewitnesses who testified that they did not see any lights); *Amsted Indus. Inc. v. Buckeye Steel Castings, Co.*, 24 F.3d 178 (Fed. Cir. 1994) (plaintiff presented sufficient evidence to contradict interested defendant's testimony that he held good faith belief patent was invalid); *Bhaya v. Westinghouse Electric, Corp.*, 832 F.2d 258 (3d Cir. 1987) (plaintiff presented prima facie evidence of age discrimination, therefore the affirmative defense of good faith should have been submitted to jury); *Gregg v. U.S. Industries, Inc.*, 887 F.2d 1462 (11th Cir. 1989) (plaintiff's testimony as to the value of his business contradicted the testimony of defendant's expert, thereby creating a jury question); *Anderson v. Russell*, 247 F.3d 125 (4th Cir. 2001) (because there was no evidence challenging officer's testimony regarding use of deadly

(Cont'd)

Here, the Seventh Circuit clearly stated that it was not judging credibility or weighing any evidence, but instead was viewing all of the evidence in the light most favorable to STI. Even having done that, there remained insufficient evidence in the record to prove that Pressly had authority to bind U.S. Trust. When there are no disputed factual issues or, as happened here, when the party with the burden of proof "has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue," the court is supposed to end the trial by entering judgment as a matter of law. Fed. R. Civ. P. 50. This Court has upheld the power of a court to direct a verdict for more than 150 years, notwithstanding the Seventh Amendment right to jury trial. *Galloway v. United States*, 319 U.S. 372, 389 n.19 (1943).

(Cont'd)
force or raising question as to officers' credibility, directed verdict in favor of defendant was proper.); *Corrugated Paper Prod. v. Longview Fibre, Co.*, 868 F.2d 908 (7th Cir. 1989) (summary judgment in favor of defendant was proper when plaintiff submitted no significant probative evidence to prove its case and failed to call defendant's testimony into question); *Gillespie v. Sears, Roebuck & Co.*, 386 F.3d 21 (1st Cir. 2004) (plaintiff's conflicting and improbable testimony regarding his knowledge of power tools and the utility of a blade guard placed his credibility in issue and was legally sufficient to created a fact issue); *National Organization for Women v. Operation Rescue*, 37 F.3d 646 (D.C. Cir. 1994) (the district court had no doubt as to the credibility of the damages evidence; in dicta the court noted that if there had been doubts as to the credibility of plaintiff's witness, the trier of fact would be free to reject "even uncontroverted evidence if it doubts the credibility of that evidence."); *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505 (9th Cir. 1985) (trial court was not required to accept plaintiff's testimony if it was inherently unbelievable or clouded with uncertainty); *Chicago, R. I. & P. Ry. v. Howell*, 401 F.2d 752 (10th Cir. 1968) (eyewitness testimony that conflicted with train engineer's and conductor's testimony regarding circumstances of a fire created jury question).

Turning to what happened here, the dispositive issue is that U.S. Trust's attorney was not authorized to enter into a binding contract. Under New York law, an attorney must have actual or express authority to bind his client to a contract. *Nash v. Y and T Distrib.*, 616 N.Y.S.2d 402, 403 (App. Div. 1994) ("It is settled law that an attorney must be specifically authorized to settle and compromise a claim."); *Fennell v. TLB Kent Co.*, 865 F.2d 498, 500 (2d Cir. 1989) (client is not bound to a purported settlement agreement reached in a telephone conference by counsel in which the client did not participate).[3]

At trial, STI had the burden to prove that U.S. Trust gave Pressly authority to enter into a binding contract. *Brumberg v. Chunghai Chan*, 204 N.Y.S.2d 315 (1959) ("In this jurisdiction the burden of coming forward with proof as to the attorney's authority rests upon the party who asserts it." ; *Slavin v. Polyak*, 470 N.Y.S.2d 38, 39-40 (App. Div. 1984) (if the client challenges an agreement made in its absence, the opposing party "has the burden of establishing that the attorney's actions were, in fact, authorized"); *Nash*, 616 N.Y.S.2d at 402 (same).[4] "[A] party who relies on the authority of an attorney to compromise an action in his client's absence deals with such an attorney at his peril." *Brumberg*, 204 N.Y.S.2d at 319.

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3. Because Pressly is a Florida lawyer representing a Florida-based client, U.S Trust also cited Florida law, under which the same result is reached. *Rushing v. Garrett*, 375 So.2d 903, 906-07 (Fla. Dist. Ct. App. 1979) ("In the absence of express authority, an attorney has no implied authority to execute a contract for the sale of real estate binding on his client.").

4. Florida law is identical. *Sharick v. Southeastern University of Health Sciences, Inc.*, 891 So.2d 562 (Fla. Dist. Ct. App. 2004) ("The party seeking to compel enforcement of a settlement bears the burden of proving that an attorney has the clear and unequivocal authority to settle on the client's behalf.").

STI offered no evidence that Pressly had actual authority and, therefore, failed to meet its burden of proof. Now, STI argues that despite its lack of affirmative evidence,[5] the case should have gone to the jury. STI claims that the jury should have been able to find actual authority merely by disbelieving the testimony of Callaway and Cavanaugh because they are interested witnesses. This Court has held that an issue cannot be left with a jury for determination if the party who bears the burden of proof fails "to present a legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986) ("before the evidence is left to the jury, there is a preliminary question for the judge . . . whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.").

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5. There is no evidence in the record to support STI's claim that Pressly had actual authority. Two U.S. Trust officers testified that Pressly's authority was limited to negotiating and that he lacked authority to enter into a contract. Ann Cavanaugh, a Senior Vice-President, testified that Pressly "was authorized by U.S. Trust Company as personal representative to negotiate a possible deal" and that his authority was limited in that "he was not authorized to actually execute a contract." Toby Callaway, U.S. Trust's Chairman and CEO, testified that Pressly was to try to find a buyer for the Sarkes Tarzian stock and he was given the authority to negotiate terms, price, etc., but "was specifically instructed, and there was no argument at all, ***that he would come back to us with those terms, and present them to us for review, analysis, and a final decision as to whether they were something that we should move forward with.***" Callaway testified that Pressly was not authorized to sign any agreements for the Estate. As the Seventh Circuit determined, this testimony was not impeached or rebutted in any way.

In *Anderson*, this Court rejected the very argument made by STI in this case. A plaintiff cannot simply rely on the hope that the jury might disbelieve an interested witness, but must offer "concrete evidence from which a reasonable juror could return a verdict in his favor":

> As we have recently said, "discredited testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion." Instead, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery.

Id. at 256-57.[6]

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6. It is well-established that to survive a directed verdict motion the nonmoving party must present more evidence than the mere hope that a jury will disbelieve the moving party's witnesses. *E.g.*, *Quintana-Ruiz v. Hyundai Motor Corp.*, 303 F.3d 62, 78 (1st Cir. 2002) ("a jury verdict cannot be based solely on a jury's rejection of the other side's uncontradicted testimony. . . ."); *Perfetti v. First Nat. Bank of Chicago*, 950 F.2d 449, 452 (7th Cir. 1991), *cert. denied*, 505 U.S. 1205 (1992) ("[T]o avoid a directed verdict or a JNOV, 'a plaintiff must do more than merely argue that the jury might have chosen to disbelieve all of the defendant's evidence. . . . A plaintiff must offer substantial evidence to support the argument.'"); *Corrugated Paper Prod., Inc. v. Longview Fibre Co.*, 868 F.2d 908 (7th Cir. 1989) ("Opposing party may not merely recite the incantation, 'Credibility,' and have a trial on the hope that a jury may disbelieve factually uncontested proof."); *Rinieri v. Scanlon*, 254 F. Supp. 469, 474 (S.D.N.Y. 1966) (same); *Curl v. International Bus. Mach. Corp.*, 517 F.2d 212, 214 (5th Cir. 1975) (same).

Significantly, the witness at issue in *Anderson* was the defendant, clearly an "interested" witness. That made no difference to this Court. In deciding a properly supported motion for summary judgment or judgment as a matter of law, the issue is not whether the movant's evidence is from interested or disinterested witnesses. Many years earlier than the *Anderson* decision, this Court expressed a similar view when dealing with the testimony of an "interested" witness who was an employee of a party:

> We recognize the general rule, of course, as stated by both courts below, that the question of the credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt.

Chesapeake & O. Ry. Co. v. Martin, 283 U.S. 209, 216 (1931) (noting that in the cases in which courts ruled that the credibility of an interested witness should be submitted to the jury," there were circumstances tending to cast suspicion upon the testimony of the witness, apart from the fact that he was interested.").

STI also argues on pages 16 and 17 that the jury has more freedom to disregard the testimony of an interested witness when the potentially dispositive facts are within the exclusive control of one party. That argument is not supported by New York substantive law because STI was required to ask U.S. Trust, *before* claiming to have entered into a contract, whether Pressly was authorized to bind U.S. Trust. If STI had made one phone call to Callaway, STI would have known what Callaway knew, and the information concerning

the "private conversations between Pressly and his client" would no longer have been private. In other words, STI's problem is not that at the start of the day U.S. Trust alone had knowledge of Pressly's authority, but that STI made no effort whatsoever to find out that information by contacting U.S. Trust. STI did so at its own peril. *Ford v. Unity Hosp.*, 32 N.Y.2d 464, 472 (1973) ("[o]ne who deals with an agent does so at his peril, and must make the necessary effort to discover the actual scope of authority").

Even if the testimony of Callaway and Cavanaugh is disregarded in its entirety, there is still no relevant evidence to support a finding that U.S. Trust gave Pressly actual authority enter into a contract. Nothing the agent says or does can create actual authority. STI, having made no effort in advance to contact U.S. Trust to confirm Pressly's authority, presented absolutely no evidence that Pressly had actual authority. That failure of proof, not any federal procedural issue or the Seventh Amendment right to a jury trial, is what this case is about. Despite STI's best effort to invent one, there simply is no federal issue in this case and no reason why this Court should grant certiorari.

II. THERE IS NO ISSUE WITH "FEDERALISM" IN THE MANNER IN WHICH THE DISTRICT COURT AND THE SEVENTH CIRCUIT TREATED SUBSTANTIVE NEW YORK LAW ON APPARENT AUTHORITY.

STI, having failed to present any evidence that Pressly had actual authority, had a fallback argument that Pressly had apparent authority to bind the Estate. That argument was so weak on these facts and under New York law that the district court judge refused even to instruct the jury on

apparent authority. On appeal to the Seventh Circuit, the Panel addressed STI's apparent authority argument and concluded, again, that there was insufficient evidence of apparent authority under New York law for that issue to be submitted to the jury.

Contrary to STI's argument, the Seventh Circuit did not make up the law, but instead followed well-established New York precedent. The fundamental flaw in STI's position is that it had absolutely no contact or communication with U.S. Trust. Apparent authority must be created by the words, acts, or omissions of the principal, and cannot be created by the agent. *Fennell v. TLB Kent Co.*, 865 F.2d 498, 502 (2d Cir. 1989); *Hallock v. State*, 64 N.Y.2d 224, 231 (1984); *Nash v. Y and T Dist.*, 616 N.Y.S.2d 402, 403 (App. Div. 1994).

In *Nash*, the court stated:

> Essential to the creation of apparent authority are words or conduct of the principal communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. These words and acts must be the acts of the principal and must not be the acts of the agent.

Id. at 403.

STI's cannot prevail by asserting that Pressly misrepresented the scope of his authority (in fact, he did not) because there are numerous cases holding a third party cannot rely upon a misrepresentation of authority by the agent in

the absence of confirmation by the client. *Ford*, 32 N.Y.2d at 470 ("The apparent authority for which the principal may be held liable must be traceable to him; it cannot be established by the unauthorized acts, representations or conduct of the agent."); *Melstein v. Schmid Lab., Inc.*, 497 N.Y.S.2d 482, 483 (App. Div. 1986) (there must be reliance on a misrepresentation by the principal, not the agent.); *N.X. v. Cabrini Med. Ctr.*, 739 N.Y.S.2d 348, 351 n.3 (2002) (third party must reasonably rely upon "the misrepresentation of an agent's authority through conduct of the principal").

The evidence here is undisputed that no one from STI's side had any direct communication with anyone from U.S. Trust (other than Pressly, its agent), either before or during the negotiating meeting, concerning the scope of Pressly's authority. Thus, nothing Pressly did or said could give him apparent authority in the eyes of STI. STI has no one to blame but itself for failing to obtain clarification of Pressly's authority from U.S. Trust. *Slavin*, 470 N.Y.S.2d at 39-40 ("A party who relies on the authority of an attorney to compromise an action in his client's absence deals with such an attorney at his own peril."); *Fennell*, 865 F.2d at 503 (same).

In a desperate attempt to avoid this legal principle, STI for the first time argues in its Petition that the doctrine of apparent authority does not require that the third party have made any inquiry at all into the scope of the agent's authority, relying upon *Herbert Constr. Co. v. Cont'l Ins. Co.*, 931 F.2d 989, 995 (2d Cir. 1991). First, STI's argument is directly contrary to an earlier holding of the New York Court of Appeals, *Collision Plan Unlimited, Inc. v. Bankers Trust Co.*, 63 N.Y.2d 827 (1984) ("By invoking the doctrine of apparent authority to justify the propriety of its actions, the bank

concomitantly assumed a duty of reasonable inquiry as to Nicholas Neu's actual perimeter of authority."); *see also, Fleet Bank v. Consola, Riccitelli, Squadere Post No. 17 Inc.*, 701 N.Y.S.2d 182 (App. Div. 2000) ("The record demonstrates that plaintiff failed to take even minimal steps to discover the actual scope of Mastan's authority. An 'agent cannot by his own acts imbue himself with apparent authority.'").

Second, STI ignores the following critical language from *Herbert*:

> In the apparent authority context, the duty to inquire only arises when "the facts and circumstances are such as to put him on inquiry," ***the transaction is "extraordinary,"***[7] or the "novelty" of the transaction alerts the third party to the danger of fraud. Were this not the rule, such a duty of inquiry would nullify the doctrine of apparent authority in almost every case. Instead, the duty of inquiry amounts to an alternative way of asking whether the third party reasonably relied on the representations of the agent that he possessed authority to bind the principal.

Id. at 995-96 [emphasis added, internal citations omitted].

This proposed transaction was not in the ordinary course of business and, in fact, was the epitome of extraordinary.

7. On this point, *Herbert* cites to *Collision Plan*, in which New York's highest court held that a mortgage arrangement whereby one corporation guaranteed the debt of an unrelated corporation was extraordinary and should have triggered the duty of reasonable inquiry. *Collision Plan*, 63 N.Y.2d at 829.

The stock represented a 73% majority equity interest in STI and was not publicly traded. The parties agreed that any transaction would require a lengthy and detailed written agreement to be drafted and reviewed by lawyers. Neither the estate nor STI regularly buy or sell stock in closely held companies. In fact, STI had repurchased its stock only on one prior occasion. As to the estate, the stock was the single largest asset and its disposition was a critical component of the pre-death and post-death estate planning and administration process. The proposed purchase and sale of the STI stock was literally a once in a lifetime occurrence from the view of both STI and the U.S. Trust. What would be more extraordinary? Therefore, even according to *Herbert*, STI was under a duty to inquire.

A few final points must be made relating to apparent authority. Contrary to STI's position, the law of apparent authority is different for lawyers than ordinary agents.[8] Under New York law, an attorney can have apparent authority only in the context of an in-court settlement conference. *Hallock*

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8. This principle is best demonstrated by the fact on pages 24 through 26 of its Petition, STI cites thirteen apparent authority cases, but only one of those cases , *N.L.R.B. v. G&T Terminal*, 246 F.3d 103 (2d Cir. 2001), involved an agent who was acting as a lawyer. The other cases involve insurance, automobile and advertising salesman and agents and other nonlawyers. *N.L.R.B.* is distinguishable for a number of reasons, the most important of which was the fact that the company's ***president*** had attended an earlier negotiating session and had agreed to all of the contract terms except an arbitration clause. *Id.*, 246 F.3d at 114-15. Here, the parties held only one negotiating session; no one from U.S. Trust attended; and there is no evidence that U.S. Trust approved any of the terms. In fact, Pressly did not speak to Callaway the entire day. The Seventh Circuit expressly considered and distinguished *N.L.R.B.* in its opinion. (Petitioner's Appendix at 16a)

v. State, 64 N.Y.2d 224, 231 (1984) (the applicable court rule required that attorneys attending pretrial conferences have authority to enter into binding in-court settlements on behalf of their clients, and the client did not object to the settlement for more than two months). Other New York courts interpreting *Hallock* have held that it "can and should be read" as limited to cases involving stipulations in open court. *Gordon v. Town of Esopus*, 486 N.Y.S.2d 420, 421 (App. Div. 1985); *see also*, *Fennell v. TLB Kent Co.*, 865 F.2d 498, 500 (2d Cir. 1989) ("We do not think the rule stated in *Hallock* would apply here, where a purported settlement agreement was reached in a telephone conference by counsel in which no party participated and Fennel made prompt objection to that agreement upon being advised as to its terms."); *Berwin v. National R.R. Passenger Corp.*, 152 F.3d 917 (Table), 1998 WL 398803 (2d Cir. 1998) (the settlement agreement was reached in a telephone conference by counsel in which no party participated and Berwin promptly objected to the settlement by refusing to sign the general release.). Here, no one from U.S. Trust participated in the negotiations and U.S. Trust's actions in notifying STI that the shares had been sold to someone else equates to a prompt objection, as in *Fennell* and *Berwin*.

Second, STI complains the Seventh Circuit's decision here will disrupt the certainty required for the transaction of commerce in New York and also expresses concern that the opinion in this case might lead to forum shopping. As to the latter, this case will not lead to forum shopping (any more than already occurs otherwise[9]) because the Seventh Circuit

9. STI chose to file this action in its home district in Indianapolis, thereby deciding that any appeal would be heard in the Seventh Circuit, rather than filing it in New York. U.S. Trust had (Cont'd)

correctly applied New York law. As to the suggestion that business people in New York would be better off having juries decide contract cases, that would serve only to create more uncertainty, especially when there are no disputed factual issues and the question is the legal effect of the evidence. Moreover, from a policy standpoint, commerce is better served with clear rules that leave no doubt as to whether a contract was made or not. New York already has clear rules which require that a party negotiating with the opposing party's lawyer have some contact – even a simple phone call – to determine that lawyer's authority. That requirement of New York law imposes no great burden on commerce.

(Cont'd)

wanted to litigate the issues in Florida and filed a petition in probate court, but upon STI's motion that case was dismissed for lack of personal jurisdiction. STI could have sued U.S. Trust in New York (because the parties' only negotiations took place there, U.S Trust would have been subject to personal jurisdiction). Instead, STI brought suit in its hometown before a hometown jury, many of whom had listened to or were familiar with local radio stations owned by STI. Also, STI never sought to certify any important undecided legal questions to the New York Court of Appeals. STI is in no position to complain about the fact that the Seventh Circuit, rather than the Second Circuit or a New York state court, decided this case.

CONCLUSION

For the foregoing reasons, U.S. Trust respectfully requests that this Court deny the Petition.

Respectfully submitted,

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APPENDIX

APPENDIX — ENTRY DENYING MOTION FOR NEW TRIAL OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION DATED JUNE 16, 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IP 99-C-0165-Y/S

SARKES TARZIAN, INC.,

Plaintiff,

vs.

U.S. TRUST COMPANY OF FLORIDA SAVINGS BANK, as Personal Representative of the Estate of Mary Tarzian,

Defendant.

ENTRY DENYING MOTION FOR NEW TRIAL

Plaintiff Sarkes Tarzian, Inc. ("STI"), moves the court, pursuant to Fed.R.Civ.P. 59(a) and 60(b), for a new trial based on the recent discovery of new evidence that it contends was improperly withheld from STI by defendant U.S. Trust Company of Florida Savings Bank, as personal representative of the Estate of Mary Tarzian ("U.S. Trust"). For the reasons explained below, the court **DENIES** STI's motion.

Appendix

I. Background

STI sued U.S. Trust for breach of an oral contract allegedly entered into by U.S. Trust's attorney, James Pressly ("Mr. Pressly"). Following a six day trial, the jury returned a verdict in favor of STI. Implicit in that verdict was a finding, based upon the jury instructions, that Mr. Pressly had actual authority to bind U.S. Trust to a contract for the sale of STI stock owned by the Estate of Mary Tarzian. U.S. Trust appealed the verdict to the Seventh Circuit, and a Panel of three circuit judges (the "Panel") unanimously reversed with instructions to enter judgment in favor of U.S. Trust.

The Seventh Circuit concluded that there was no evidence presented at trial that Mr. Pressly had actual authority to bind U.S. Trust. Specifically, the Panel determined that there was unrebutted testimony by U.S. Trust's Chairman, Mr. Callaway, and Senior Vice President, Ms. Cavanaugh, that Mr. Pressly's authority was limited to negotiating the terms of a potential contract, subject to final approval by U.S. Trust. The Panel noted that New York law imposes the burden on STI to ascertain that Mr. Pressly had actual authority to enter into a contract on behalf of U.S. Trust, and the Panel ultimately found that STI did not discharge its burden because STI made no effort to reach out to or call U.S. Trust's principals to determine the extent of Mr. Pressly's authority.

STI now seeks a new trial based upon "newly discovered evidence" in the form of Mr. Pressly's handwritten notes related to his conversations with Bull Run between the end of the negotiation session with STI in New York on January 25, 1999, and the sale of the STI stock to Bull Run three days later. Those

notes were designated as attorney work-product on the privilege logs served in this case in 2000. (Declaration of Paul Sweeney ("Sweeney Dec."), Ex. E at 68). The notes were produced four years later in litigation between STI and Bull Run pursuant to a subpoena served on Mr. Pressly, after U.S. Trust elected to waive the applicable work product privilege. STI contends these notes are evidence that Mr. Pressly believed he had actual authority to bind U.S. Trust to a contract.

II. Discussion

A party moving for a new trial under Rule 59, based on newly discovered evidence, must prove: "(1) the evidence was discovered following trial; (2) [d]ue diligence on the part of the movant to discover the new evidence is shown or may be inferred; (3) [t]he evidence is not merely cumulative or impeaching; (4) [t]he evidence is material; and (5) [t]he evidence is such that a new trial would probably produce a new result." *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 732 (7th Cir. 1999). If any one of these elements is not satisfied, the movant's motion must be denied. *Id.*

The handwritten notes of Mr. Pressly read, in relevant part:

> Steve Opler [Bull Run's representative]
> 404-881-7693
> Alston & Bird in Atlanta
> How clean is their offer?
> He says it is very clean.
> It says that we represent that
> we own the stock. They represent
> that they'll close 'tomorrow.'
> I tell him we want to be indemnified.

(Sweeney Dec., Ex. A at 0001). Later that same day, Mr. Pressly wrote, "We agreed upon terms and they are to draw up contract. I asked him about indemnification." (*Id.*, Ex. A at 0002).

The court finds this evidence does not satisfy elements (3), (4), or (5) above. The notes are cumulative and immaterial because the notes do not address the deficiencies in STI's proof. For example, Mr. Pressly's notes do not address the scope of his authority. Mr. Pressly's notes do not contradict Mr. Callaway's and Ms. Cavanaugh's testimony that although Mr. Pressly had the authority to negotiate a deal, he did not have the authority to bind U.S. Trust to a contract without first obtaining its approval. Finally, Mr. Pressly's notes do not demonstrate an effort on the part of STI to reach out to or call U.S. Trust's principals before or after the January 25th meeting to determine the scope of Mr. Pressly's authority. Accordingly, a new trial would not produce a different result.

III. Conclusion

For the reasons stated above, the court **DENIES** STI's Motion for New Trial.

SO ORDERED this 16th day of June 2005.

s/ Richard L. Young
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

MOTION FILED
AUG 2 2 2005

No. 04-1712

IN THE

Supreme Court of the United States

SARKES TARZIAN, INC.,
Petitioners,

v.

U.S. TRUST COMPANY OF FLORIDA SAVINGS BANK,
as Personal Representative of the Estate of Mary Tarzian,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR PERMISSION TO FILE A BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER AND BRIEF OF *AMICI CURIAE* PROFESSORS LAUREN ROBEL AND AVIVA ORENSTEIN IN SUPPORT OF PETITIONER

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR PERMISSION TO FILE A BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to this Court's Rule 37 (b), *Amici Curiae* Lauren Robel and Aviva Orenstein seek permission to file the attached Brief in Support of Petitioner. *Amici* sought permission from the parties to file this brief, and U.S. Trust Company of Florida Savings Bank declined to provide that permission. *Amici* are professors of procedure, federal jurisdiction, and evidence with an interest in the Court's uni form interpretation of U.S. Const. Amend. VII and Fed. R. Civ. P. 50.

Respectfully submitted,

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QUESTION PRESENTED

Does a *per se* rule forbidding a jury to disbelieve the unrebutted testimony of an interested witness violate the Seventh Amendment?

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IN THE

Supreme Court of the United States

No. 04-1712

SARKES TARZIAN, INC.,
Petitioners,

v.

U.S. TRUST COMPANY OF FLORIDA SAVINGS BANK,
as Personal Representative of the Estate of Mary Tarzian,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE* PROFESSORS LAUREN ROBEL AND AVIVA ORENSTEIN IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE* [1]

Amici Curiae are professors who teach in the fields of civil procedure, federal courts, and evidence. Dean Lauren Robel is the author of a casebook on federal jurisdiction and numerous articles on the federal courts and procedure. Professor

[1] Pursuant to Rule 37.6 of this Court, we state that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

Aviva Orenstein is a teacher and scholar of procedure and evidence and has written widely in the field of evidence. As scholars and commentators in the field, *amici* have an interest in maintaining a consistent and uniform interpretation of the jury's role under the Seventh Amendment and Fed. R. Civ. P. 50.

INTRODUCTION AND BACKGROUND

In this case, a jury rejected the testimony of two interested witnesses and determined that U.S. Trust Company of Florida had reneged on a deal to sell stock through its agent. The United States Court of Appeals for the Seventh Circuit reversed the jury's verdict, holding that the jury was required to believe the testimony of these witnesses that the person who had entered the deal was unauthorized to bind the company. Specifically, the court held that a jury may not "ignore or discredit the testimony of unimpeached witnesses so far as they testify as to facts." *Sarkes Tarzian, Inc. v. U.S. Trust Company of Florida Savings Bank*, 397 F. 3d 577 (7th Cir. 2005) *quoting United States v. 2.4 Acres of Land, More Or Less, In Lake County, Ill.*, 138 F. 2d 295, 297 (7th Cir. 1943).

SUMMARY OF ARGUMENT

This case presents the opportunity for this Court to reaffirm in the Seventh Amendment context what it has recently made abundantly clear in the Sixth Amendment context: The jury's obligations to determine facts, draw inferences from those facts, and determine witness credibility are at the core of the constitutional jury-trial guarantees. While this Court has recently reaffirmed those core obligations in the context of the criminal jury, *United States v. Booker*, 125 S.Ct. 738 (2005); *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the textual and historical basis for reinforcing those obligations in the Seventh Amendment context is even stronger.

The Seventh Circuit's holding in this case, which requires juries to accept the testimony of interested witnesses, imperils these core obligations in the context of the civil jury. Its holding degrades the jury's function by creating a *per se* rule that forbids jurors from exercising their prerogative to reject testimony as incredible or inconsistent with other circumstantial evidence in a case, so long as the testimony is "unimpeached," regardless of the witnesses' stake in the outcome of the trial. Such a rule is deeply threatening to the jury's core function.

This case is particularly important because, unlike most of the Court's recent cases on the Seventh Amendment, it concerns not the appellate standard of review but a direct limitation on the inferences that a jury may draw from evidence. As such, the case presents an important opportunity to reaffirm under Seventh Amendment what this Court has recently made abundantly clear under the Sixth Amendment: The core function of a jury is to find the facts, draw inferences from them, and apply the appropriate legal standard to them.

ARGUMENT

I. THE ESSENCE OF THE RIGHT TO TRIAL BY JURY IS THE FREEDOM OF THE JURY TO FIND FACTS, DRAW INFERENCES, AND WEIGH WITNESS CREDIBILITY

While the Sixth and Seventh Amendments have different language and histories, both rely on a shared understanding of the important mediating role played by lay juries between litigants and the power of the judiciary. As Bruce Mann explained in his history of law in the early colonies:

> In background, experiences, and outlook [jurors] were much like the litigants whose disputes they determined, and not very different from the judges who oversaw them. They applied the same standards in their deliberations that the litigants themselves would apply in similar

> cases involving others, which is to say standards shaped by a template of common beliefs and expectations as to how neighbors should treat one another. It was this commonality that gave substance and meaning to the traditional description of jurors as "men of the neighborhood."

Bruce Mann, NEIGHBORS AND STRANGERS (Univ. of N.C. Press 1987) at 71. This similarity in background and experiences provides legitimacy to judicial process, and provided what our Founders considered a crucial "bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979) (Justice Rehnquist, dissenting.)

While the respective roles of judge and jury have been subject to change and revision over time, *see, e.g.*, Paul Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. Chi. Legal F. 33, 44 (1990)(noting early juries' role in declaring law), there is no controversy that at the core of the jury role is the power to find facts. 3 Sir Edward Coke, Commentary on Littleton 460 (J.H. Thomas, Ed. 1818) ("Judges do not answer questions of fact; juries do not answer questions of law.") Early interpretations of both the Sixth and the Seventh Amendments described the jury's power to find facts and draw appropriate inferences as the key to its constitutional role under either Amendment. In *United States v. Sparf*, 156 U.S. 51, 102-103 (1895), this Court rejected the idea that criminal juries were permitted to "nullify" the law while describing the duty of the jury as applying the law "to the facts as they, upon their conscience, believe them to be." Similarly, in *Walker v. New Mexico & Southern Pacific Railroad*, 165 U.S. 593, 596 (1897), this Court described goal of the Seventh Amendment as preserving not particular forms of procedure, but "the substance of the right"; to do so "requires that questions of fact in common-law actions shall be settled by a jury, and that the court shall not assume, directly

or indirectly, to take from the jury or to itself such prerogative." *See also Ex parte Peterson*, 253 U.S. 300, 310 (1920) ("[t]he limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with."); *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 537 (1958) ("[a]n essential characteristic of [the federal] system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence-if not the command-of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.").

In a recent string of cases, this Court has reiterated the jury's claim to find facts necessary to the ultimate punishment of a criminal defendant. *Booker, supra; Blakely v. Washington*, 124 S.Ct. 2531 (2004); *Apprendi, supra*; *Jones v. United States*, 526 U.S. 227 (1999). In those cases, as this Court recognized "[t]he effect of the increasing emphasis on facts that enhanced sentencing ranges," *Booker*, 125 S. Ct. at 751, it also recognized the need "to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government . . . ." *Id.* at 752. The answer this Court has given—to return the jury to its crucial role in finding the facts—was "not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance." *Id.*

The textual basis for the jury's claim to its role as fact-finder is stronger yet in the context of the Seventh Amendment, which explicitly recognizes this role through the language of the Reexamination Clause, U.S. Const. Amend. VII ("[N]o fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."); *cf.* U.S.Const. Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a

speed and public trial, by an impartial jury . . . ."). The understanding that the civil jury's core role is to find fact is supported by the Judiciary Act of 1789, ch. 20, § 9, which provided that "the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury." As Professor Kirgis notes:

> Although [the Judiciary Act's] passage preceded the ratification of the Seventh Amendment, the Judiciary Act provides a window into the procedural mindset of the first Congress, which comprised many of the men who subsequently participated in the drafting and ratification of the Bill of Rights. Those men would not have created a constitutional right to a jury trial significantly different from the jury guarantee they had imposed on federal trial courts by statute just two years earlier.

Paul Kirgis, *The Right to a Jury on Questions of Fact under the Seventh Amendment*, 64 Oh. St. L. J. 1125, 1133 (2003).

While this Court has considered many difficult Seventh Amendment questions concerning the division of labor between the judge and the jury, rarely has it considered an encroachment on the jury's core function as explicit as that adopted by the Seventh Circuit. Forbidding the jury to take into account the fact that a witness is interested in the outcome in assessing that witness's credibility runs counter to both common sense and the jury's historic role. It contributes to undermining the importance of the jury, and the role of jury trials, in our system. It should be reversed.